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Contractual networks and economic development: a proposal by Italy for possible future work by UNCITRAL on alternative forms of organization to corporate-like models — advanced proposal

Note by the Secretariat

The Government of Italy has requested the Secretariat to transmit for consideration by the Commission at its fifty-first session an advanced proposal for possible future work by UNCITRAL on alternative forms of organization to corporate-like models (contractual networks). The text of the proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat. An earlier version of the proposal was before the Commission at its fiftieth session, in 2017 (A/CN.9/925).

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Annex

Contractual networks and economic development: a proposal by Italy for possible future work by UNCITRAL on alternative forms of organization to corporate-like models — advanced proposal

I. Introduction

1. At the twenty-third session of Working Group I, held in Vienna from 17 to 21 November 2014, Italy and France submitted observations on Possible Alternative Legislative Models for Micro and Small Businesses (A/CN.9/WG.I/WP.87). At the twenty-eighth session of Working Group I, held in New York, from 1 to 9 May 2017 (A/CN.9/WG.I/WP.102), and then at the fiftieth session of the Commission, held in Vienna from 3 to 21 July 2017 (A/CN.9/925), Italy further submitted a more specific proposal for possible future work by UNCITRAL on alternative forms of organization to corporate-like models. Such observations and proposal by the Italian Republic aimed at presenting domestic legislative models applicable to micro and small businesses based on multiparty agreements that could organize cooperation and joint business, as well as eventually provide for the segregation of business assets without requiring the creation of a separate entity, but that could offer limited liability protection.

2. In particular, reference was made to cooperation among micro, small and medium-sized enterprises (MSMEs) through the so-called "contractual networks" (known and regulated under Italian law as "*contratto di rete*"). This model offers great flexibility in the organization of cooperation, as well as the possibility of segregation of assets and consequently limited liability protection. It facilitates internationalization of MSMEs and cross-border cooperation thanks to such flexibility and the range of different levels of cooperation it can offer. Moreover, it provides a tool to link MSMEs to larger companies by permitting MSMEs to be connected to the supply chain of such companies.

3. Working Group I is currently working on two separate instruments, one on business registration (A/CN.9/940 — Draft legislative guide on key principles of a business registry) and another on the statute of a limited liability organization (A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1 — Draft Legislative Guide on an UNCITRAL Limited Liability Organization, UNLLO). In the strong hope that the Draft legislative guide on key principles of a business registry be adopted by the Commission at its fifty-first session, and bearing in mind that the Italian proposal always meant to fill a gap between issues of business registration, on the one hand, and the establishment of a limited-liability organization, on the other hand, with a flexible contractual instrument, Italy is resubmitting its proposal for future work on contractual networks in the light of further insights, as it was agreed by the Commission at its fiftieth session (A/72/17, para. 455).

4. Work on contractual networks would be complementary to that on UNLLO. Both models would permit the strengthening of cooperation by regulating its organization. However, while UNLLO would require the establishment of an entity with legal personality [Recommendation 3 as in A/CN.9/WG.I/WP.99] and the sharing of a common activity, contractual networks in general would preserve the identity and autonomy of each member. Moreover, flexibility in contractual networks would even be greater than in the case of UNLLO, and permit also looser forms of cooperation, although keeping an element of organization by the very fact that contractual networks by definition require the sharing of a common project (so distinguishing contractual networks also from existing commercial agreements where elements of cooperation are present, as in the case of agency or distribution agreements).

5. The content of the present note delves into and articulates on the previous contributions submitted by the Italian Republic also in the light of individual requests for clarification received from other delegations either in the course or after the Commission's fiftieth session. Moreover, at this stage Italy tries to abstract to the maximum possible extent from the specificities of its own domestic legislation to facilitate the employment of a functional approach.

II. Background

Contractual networks and cross-border cooperation

6. MSMEs constitute the skeleton of domestic industrial and agricultural production systems. However, they experience serious hurdles to access global trade and global supply chains. These hurdles concern in particular: (1) access to capital; (2) access to technology, intellectual property rights, and know how; and (3) access to a qualified and well-trained labour force. In order to ensure the participation of MSMEs in global trade, access to critical resources has to be facilitated by promoting appropriate common legal frameworks.

7. Contractual networks (i.e. multiparty contracts between MSMEs located in the same or in different jurisdictions) address such hurdles, can contribute to internationalization and facilitate access to foreign markets. They can also help to link networks of local enterprises with foreign networks and permit specialization according to the market where each operates. Since they are based on contracts, there is no need for establishment in a specific country among those in which participants are based, nor for ownership integration, while still permitting to various extents governance control over the partners. In this sense, contractual networks could be compared to contractual joint ventures, although in the case of networks cooperation can even be much looser.

Business environment

8. MSMEs' growth is driven, among other factors, by the adoption of an appropriate legal framework to promote their coordination in order to favour economic growth and specialization.

9. Such growth can occur through integration in corporate entities or via contractual collaboration in various degrees.

10. These two families of legal instruments are complementary. The corporate-like family (company, cooperative) supports the integration of existing different enterprises when the level of mutual trust and reciprocal knowledge is high and the industrial project is well defined from the very beginning. The contractual family provides a set-up for enterprises to start new collaborations, in particular when they might not otherwise enter into a demanding and burdensome common industrial project. Lack of steady availability of physical capital or uneven access to financial resources among potential partners may also discourage MSMEs from entering into corporate-like forms of integration. The complementarities between corporate-like and contractual modes might establish a process whereby MSMEs start with contractual collaboration and end with the creation of new companies that integrate some of their activities, although this is not a necessary outcome. Complementarities to this end should be seen in terms of the different alternatives offered by the legal system to organize cooperation according to the needs.

11. Collaboration is a process that might require various steps. The first is through contractual collaboration that may or may not translate into the creation of a company with a higher degree of ownership integration of different types of assets including both tangible and intangible ones. Hence, the evolution of a contractual collaboration

over time should be compatible with dissolution, preservation or transformation of the contract into a corporate entity.

12. Contractual networks may provide such an instrument with a relatively low level of initial capital, low entry and exit costs, and a light governance infrastructure. Multiparty contracts may facilitate access to capital by providing joint collateral to credit institutions; they can facilitate access to new technologies with the creation of common technological platforms, where common intellectual property rights may be used. Access to a qualified labour force may be enabled through the possibility of sharing employees who may rotate among the enterprises participating in the network, thus increasing specialization and the effective use of human capital.

13. Contractual networks include different existing forms of multiparty contracts ranging from joint ventures to consortia, franchises or patent pools; they can take the form of either a single contract with several parties, or of a set of interlinked bilateral contracts with high levels of coordination and interdependence. These contractual models include production and distribution and can be domestic or international. They can provide MSMEs with the legal infrastructure to trade (for example, through e-commerce platforms and payment systems). Legal frameworks exhibit a great degree of differentiation between jurisdictions that make international MSME collaboration very difficult. In addition, choice of law and forum rules are unclear for multiparty contracts; and even less clear for interlinked contracts.

14. Essentially two forms of contractual networks are currently in place. *Horizontal networks* are networks in which various SMEs contribute to a common project with their *products or services*, playing a similar role along the supply chain or having similar expectations from the network programme (e.g. new trade opportunities for the sale of final products). Horizontal networks partaken by micro- and SMEs may play an important role in capacity-building and technology development, so enhancing SMEs' ability to get access to Global Value Chains (GVCs) or upgrade their position along the chain. *Vertical networks* operate along supply chains that include different stages of production/distribution. Participants in vertical networks (e.g. suppliers) perform activities (e.g. production of intermediate goods, supply of services) to be incorporated into the activity of another chain participant (e.g. an assembler) and the network is aimed at coordinating their interdependent activity along the lines of a chain project, often developed by a chain leader. Transnational Corporations (TNCs) look for stable relationships that decrease coordination costs and increase the stability of the supply required by global markets. In order to stabilize the supply chain governance, they need stronger coordination between local suppliers of inputs and intermediate goods and chain leaders. This process is reinforced by the increasing number of regulatory requirements, as on safety, environmental and social protection, to be applied along the global chain. In order to facilitate access to global trade, cross-border contractual collaboration is necessary and specific legal forms tailored to SMEs are needed. Such forms may contribute to the process of the internationalization of SMEs through or independently from existing global chains.

15. Finally, creativity and innovation with intellectual property protection and management are among the key drivers of competitiveness, growth and development. This underscores the importance of network contracts in giving rise to platforms with a view to jointly exploit intellectual property rights. In particular, MSMEs can share existing technology provided by one or more platform members, directly co-produce new technology within the platform itself or acquire technology licensed/transferred by subjects that are not party to the platform. Network contracts may also ease the provision of technical assistance given to MSMEs related to intellectual property by business and government bodies, by facilitating the transfer of information and knowledge to a single collective subject and its subsequent dissemination among the network members.

The legal institution under Italian law

16. The "contractual network" ("*contratto di rete*") was first introduced into the Italian legal system in 2009. It is an agreement by which "*more entrepreneurs pursuing the objective of enhancing, individually and collectively, their innovative capacities and competitiveness in the market, undertake a joint program of collaboration in the forms and specific clusters as they agree in the network contract, or to exchange information or services of an industrial, commercial, technical or technological nature, or to engage in one or more common activities within the scope of their business*". The scope of contractual networks can thus broadly differ, and kind and degree of cooperation are left to the free agreement of parties, as long as, through the determination of a common programme, strategic goals are shared that allow either the improvement of innovative capacity or the growth of competitiveness. Cooperation can range from a plain undertaking to exchange information or services, to the organization of cooperation, up to the joint conduct of economic activities. This leaves the door open to vertical (coordination of suppliers with shared standards of production, distribution or franchise chains), or horizontal integration (research and development, centralized point of sale or of acquisition). Under a recent amendment to the relevant legislation, business networks can also take part in public bids. The sole requirement to enter into a business network contract is to be an entrepreneur, irrespective of the nature and the activities performed. This includes sole ownership, companies of all kinds and enterprises owned by public entities, including those of a non-commercial nature, as well as for profit and non-profit entities (mixed networks do not seem to be precluded, where there are for-profit and non-profit participants). Business networks, although factually mainly used as a scheme for cooperation of MSMEs, are thus generally open to any businesses, including corporations and groups. Eventually, a very recent reform (as of 2017) has extended the use of mixed network contracts, partaken by businesses and professionals, when established for participating in public bids.

17. In order to carry out the programme of the contractual network, contracting parties may establish a common fund. This is a separate fund exclusively devoted to implement the programme of the network and the pursuit of its strategic objectives. Creditors of individual participants to the network cannot rely on the fund, which only serves to satisfy claims deriving from the activities performed within the scope of the network. Publicity is given by registration in the business registry.

18. Business networks do not normally have legal personality, nor necessarily need to be established as a separate entity. However, recent amendments to relevant legislation (as of 2012) permit these to also be established as a separate entity.[1]

19. Contractual networks under Italian law can be seen both as a form of aggregation around a project, as well as a tool to start a process of aggregation that can lead to more structured forms, such as more binding and articulated contractual network schemes, the constitution of new companies equipped with legal personality, up to business mergers.

20. This gradual approach can be possibly divided into three distinct situations (that can yet also be kept as a permanent arrangement):

- A "light" network of companies is created, which carries out an activity that is often only internal, that is, without involving subjects other than the members, which does not have a common fund, and whose common body (if established) is composed of the members themselves, who periodically meet to take decisions. In this first situation, the commitment of the participants is limited, a contract has been signed with specific rules of conduct before a notary, limited capital has been invested, meetings take place and joint activities are carried out using the respective companies' structures: a way to pursue a common project

[1] A more articulated description of the Italian law on contractual networks is contained in the annex to A/CN.9/WG.I/WP.87.

and test each other, without compromising the company's autonomy or investing large amounts of capital. The risk associated with the joint and several liability of the members is low, given that only activities within the network are carried out;

- The participants can decide to expand the network activity, which from "light" becomes "heavy", creating a common equity fund to support greater investments, equipping themselves with a structure dedicated to the management of the network programme. If the common body is established and the network carries out an activity, including commercial activity, towards third parties, assuming obligations towards the latter for the execution of the programme, the network can be subject to a special regime that limits the liability of the participants or network operators. This occurs by the segregation of assets produced by the constitution of the common equity fund;

- The network can also sign contracts and take on liabilities, i.e. to become an independent centre for the rights and obligations, and requires legal subjectivity by registering in the ordinary section of the business registry of the place where it is based. The common body is no longer a proxy for the participants in the network but an independent legal entity. Participants are now in a position to perform common external activities in an efficient and stable manner, for example by selling products designed or built together or by carrying out commercial or marketing actions coordinated on foreign markets. This activity will be carried out directly by the network following the request for legal subjectivity and consequent attribution of a VAT number.

21. The above illustration of a possible gradual approach only shows the role of these new legal institutions within the existing Italian business and legal context, since all described activities can be performed under any of the proposed schemes of cooperation, and each can be considered as a permanent instrument for cooperation according to the needs.

22. Flexibility and scalability are two features of this legal institution that make it exportable and of universal use.

23. To that end, as indicated above (para. 4), Italy refrains from making direct reference in the following parts of this Note to its own legal system. However, to help understand the concrete content of a possible international instrument and to anchor this exercise to existing regulated forms of organization of business cooperation, a few tables are included with main features of contractual networks in order to compare them with the most proximate existing legal institution in the Italian legal regime for the purposes of this Note.

III. Legal Framework

An integrated modular proposal of an international instrument on contractual network: also a means to look at sustainable development and the respect of corporate social governance

24. Whereas we believe that instruments for micro enterprises (MiEs) might differ from those for SMEs, we would envisage a modular legal instrument with common general principles and possibly specific sections addressing different needs, according to dimension and/or mission.

25. Moreover, these general principles might be drafted having in mind a multilevel system: i.e., whatever is not explicitly regulated would be supplemented by national legislation, leaving scope for a certain level of differentiation in legal architecture. The international instrument would define the specific principles and provide the relevant definitions but some aspects (for example, mistake, fraud, or avoidance) could be left to the applicable contract law.

26. Most importantly, the structure of such principles should identify the new roles of contract beyond pure exchange, focusing on organizational and regulatory functions in order to ensure that network contracts can also promote compliance with global standards related to environmental, social, and data protection requirements, and should be applicable to both domestic and transnational networks.

27. These rules should ensure both the stability and the flexibility of the contractual network, and distinguish between internal relationships among members and relationships between the network and third parties, in particular, with creditors. Such rules could provide for different degrees of complexity with increasingly structured forms of governance, which could take place inside the network or could use companies controlled by the network to perform specific activities that require limited liability and asset partitioning.

28. *Contractual networks and the objective of the contract.* The distinctive feature of contractual networks should lie on their objective more than on their formal structure. Parties should agree on a specific set of actions for the achievement of one or more specific objectives which are of strategic relevance in respect of the business of each participant or for the network as such.

29. Though related with participants' nature and activity, the core object of the network activity does not need to be ancillary in respect of the participants' activity; several options should be available: from the mere organization of coordination of supply of goods, service or information among participants (e.g. through the establishment of a commercial platform) through collaboration into a strategic project (e.g. a Research and Development (R&D) project for the development of a new product) to the performance of a common activity (e.g. the production and distribution of a new product jointly designed).

30. Model rules should allow parties to tailor the network structure upon the network nature and objectives. Model rules should not define the possible contents of the common programme but, most importantly, require that objectives are clearly defined and that parties agree on modes for the subsequent specification of implementation measures, their assessment and adjustment along the network life.

31. Parties should be able to establish networks for the execution of a specific project or for the establishment of a cooperative platform able to run multiple projects. In multi-projects networks, parties should not be forced to partake to all projects but project participation should be tailored upon businesses' interest and capacity.

32. *Cooperation.* Cooperation shall remain the core element of contractual networks. In contractual networks cooperation implies willingness to combine individual and collective interests as well as ability to adapt choices in order to ensure that a network's objectives may be achieved.

33. Cooperation does not necessarily require equality of arms; powers and resources may be unevenly allocated as well as abilities and knowledge may differ from one participant to another.

34. Especially when these asymmetries are rather important, abuses should be discouraged through effective monitoring within the network and, when needed, through measures aimed at preserving the collective value generated by the network and its future functioning.

35. Specific investments made by participants should be preserved, especially when, also due to their size, network participants struggle to get alternative options out of the network.

36. *Duration.* Model rules should not require a specific duration.

37. However, parties should be encouraged to adapt duration in respect of the objectives pursued and the specific investments expected from participants.

38. *Entry and exit.* Model rules should require parties to clearly define whether a subsequent entry into the network is possible and upon which conditions. Parties

should be able to complement the network's capacity through the entry of new participants as well as to limit this entry when it is not functional to the implementation of the network programme.

39. Parties should also be requested to clearly define whether and which conditions voluntary exit is allowed, taking into consideration the consequences of exit for both the exiting participant and the remaining ones.

40. Similarly, cases and procedures for exclusion should be clearly defined in the contract and due process guarantees should be established for a correct balancing between the network's participants who exclude one member and the member who is excluded from the network.

41. Abuses should be discouraged and measures for addressing post-contractual imbalances should be available, including cooperative, corrective and compensatory measures.

42. *Knowledge development and transfer*. When defining a uniform legal framework, strategic importance might be accorded to knowledge transfers and innovation among the enterprises of the network and between the network and third parties. Contract rules become extremely important when knowledge cannot be "propertized" (e.g., cannot be made proprietary) either because no legal devices are available, or because the benefits of sharing are such that individual or even collective ownership would be inappropriate.

43. In particular, two problems usually emerge within network governance: (1) proportionality between investments, contributions and revenues, since lack of proportionality often emerges between individual investments and profits, and opportunistic behaviour by some members of the network might arise; and (2) the interest of the contractual networks might require protection against behaviour such as unfair competition, violations of trade secrets, or unauthorized transfers to third parties external to the network.

44. A special regime concerning trade secrets and intellectual property rights might also need to be devised so as to maximize incentives to produce innovation inside the network, but, at the same time, to generate strong safeguards against knowledge leaking outside the network.

45. Since creation and use of intellectual property rights might be too expensive for individual MSMEs, forms of collective ownership and licensed use might be regulated by multiparty contracts making innovation also possible for firms with limited capital. A network contract may provide the legal infrastructure to manage the IPR platform

46. *Contractual networks and choice of legal forms*. Whereas the functional and cooperative features of contractual networks should be clearly defined in model rules, choice of legal forms should not be limited to a specific type of contract or organization.

47. From the point of view of the legal structure, options could include:

- (Bilateral or) multiparty contracts which are normally closed or open to the subsequent entry of new participants, subject to the requirements established in the contract;
- Multiparty contracts with or without a specific governance structure such as an administrative or governing body, representing the interests of the network's participants, also in the relation with third parties;
- Multiparty contracts where assets, including any possibly established fund, are owned individually or collectively by network participants or, when requirements consistent with applicable law are met, by the network as a separate entity;

- Multiparty contracts in which parties may enjoy limited liability to the extent that due guarantees are given in favour of creditors and third parties consistent with general principles and limitations established in applicable law.

48. Beyond the scope of this Note could stand other structures, including, e.g., linked bilateral contracts (along the lines of franchising or strategic subcontracting) as well as the link between a multiparty contract and a bilateral contract as, for example, happens when a contractual network is aimed at the execution of a construction contract in private or public procurement. Linked contracts feature strong functional interdependence so that one contract cannot exist without the other, e.g. when a production contract is linked to a financing contract.

49. *Contractual networks and the corporate frontier.* Depending on applicable law, the boundaries between corporate-like forms and contractual forms may be blurred.

50. Determinants of the distinction between contractual networks and corporate entities may include: the degree of organizational complexity, the extent of liability (limited or not limited), asset partitioning, the type of agency relations involved, the existence of a common business activity.

51. The development of modular legal instruments for networks, going from merely contractual ones to more complex forms, including limited liability and/or the establishment of a separate legal entity constituted under specific conditions, could fill an important gap.

52. Indeed, networks may benefit from the choice of legal forms that enable participants to run a common activity (e.g. a joint R&D department or the production of a co-designed new product), with a common administrative and representative body and a common fund, without other elements of corporate forms; e.g., decision-making mechanisms may depart from the usual correlation with capital investments, or limited liability for certain network activities may be combined with joint and several liability for others.

53. We intentionally avoid reference to legal personality, since it has different meanings across legal systems. However, a line could be drawn between segregation of assets, on the one side, and establishment of a separate legal entity, on the other. Whereas in the latter case the separate legal entity is an autonomous centre of rights and obligations, segregation of assets maintains the relevance of a plurality of legal actors but yet might permit — following adequate publicity — creditors of the network to only rely on the segregated assets.

54. *Asset partitioning.* Consideration should indeed be given to instruments that permit the segregation of assets and the establishment of limited liability protection for the activities covered by the contractual network (or parts thereof), in order to offer an additional instrument to MSMEs.

55. In correlation with general principles, rules and limitations provided by the applicable law, these instruments should be tailored on the nature of the network programme (e.g. its ability to generate revenues).

56. Moreover, the scheme should be defined taking into consideration the interests of creditors and third parties, with special regard to those harmed by network activity. For example, depending on the applicable law and on the legal form chosen, networks could benefit from limited liability regimes to the extent that they build up an adequate financial structure, preventing commingling between network assets and participants' assets, and adopt accounting rules enabling full transparency and clear reporting on the use of network funds.

57. Finally, safeguards should be in place to avoid exposure of those affected by the network activity on an extra-contractual basis, such as consumers, to any limitation of liability when claiming damages.

58. *Cross-border networks.* Legal entities are established under a specific legal system and cannot depart from its rules if not for limited aspects of their activities. In

the case of contractual networks, flexibility is also ensured by the choice of the applicable law.

59. Specific rules concerning private international law might be appropriate in this context.[2] In multiparty contracts, when enterprises located in different jurisdictions want to collaborate there is a need to identify the applicable law to fill the gaps that are not explicitly regulated by the contract.

60. Freedom of choice of applicable law should be encouraged along the lines of other initiatives established at the international level.[3]

61. The international dimension may also require forms of mutual recognition when enterprises are registered in national business registries with different requirements.

62. To this latter extent, it would be advisable that the proposed international instrument permit coordination among the different business registration regimes in the countries of the network's members.

[2] The above considerations are without any prejudice to the competence of The Hague Conference on Private International Law.

[3] See The Hague Conference on Private International Law, *Principles on choice of law in international commercial contracts* (approved on 19 March 2015), available at https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5cafc7c1f2a1.pdf.

Annex to the proposal

ELEMENTS TO BE REGULATED IN A CONTRACTUAL NETWORK UNDER ITALIAN LAW	
Identification of each participant	Needed for exact identification of the participants, in connection with the disclosure regime of the contract, that the law provides through its registration in the business registry.
Indication of the strategic objectives and the methods agreed between the participants to measure progress towards these objectives	The specification of the strategic objectives that the parties aim to achieve, must be accompanied by an indication of the manner in which they will measure, during the execution of the contract, the respective progress towards these goals.
Definition of a network program that contains the rights and obligations of each participant, and how to achieve the common objectives	The network programme and its implementation constitute the object of the contract. This programme must indicate: the rights and obligations of each participant or the specific arrangements allowing the performance of these obligations by the participants or the realization of the common purpose of all the participants.
Duration of the contract	The contractual network may not be concluded for an indefinite time. That does not mean that the parties may not proceed with its renewal, providing for automatic renewal in the absence of notice of cancellation by those who do not intend to keep the constraint of the network contract.
Methods of joining of other participants	The network contract must anticipate the possibility of subsequent adhesion of other entrepreneurs, it being understood that such a possibility must be governed by the original parties, which retain the right to define the network access requirements on the part of new participants and the modalities through which the original parties express their assent to the accession of the new entity.
Rules for taking decisions on every subject or aspect of common interest	The participants must define the mechanism by which decisions are taken regarding matters or issues of common interest.

THE AGREEMENT MAY OPTIONALLY INCLUDE:	
Appointment of a common body to manage the contract	The network contract may provide for the establishment of a common body, which can be made up of either a single or several persons, to manage the contract. The body receives a mandate for the direction and conduct of activities in the network agreement. It will represent the network if this is a separate entity, or the participants if this is not.
Establishment of a common fund	The optionally established fund has specific limitations as to its use, being finalized to the implementation of a network programme and then to the pursuit of strategic objectives. The contract must include the measurement and the evaluation criteria of its initial allocation and any subsequent contributions by the parties. Contributions may be in cash, in goods and services (provided they are capable of economic assessment).
Management rules of the fund	It would be appropriate to identify the subject to whom the management of the fund should be entrusted, or the modalities for the realization of investments and those for the use of common assets.

TEXT OF THE MAIN PROVISION OF ITALIAN LAW CONCERNING DEFINITION AND QUALITIES OF CONTRACTUAL NETWORKS

Article 3, paragraph 4-ter L.D. n. 5/2009 [as converted into law and further amended]

"1. With the contractual network, entrepreneurs pursue the goal of increasing, individually and collectively, their innovative capacity and their competitiveness in the market and ***to this end they are committed, on the basis of a common network program, to collaborate in forms and in areas predetermined*** *for the exercise of their companies or to exchange information or services of an industrial, commercial, technical or technological nature or to jointly exercise one or more activities falling within the scope of their business.*

2. The contract ***may also provide for the establishment of a joint equity fund and the appointment of a common body responsible for managing, in the name and on behalf of the participants****, the performance of the contract or of individual parts or phases of the same.*

3. ***The network contract that provides for the common body and the equity fund does not have legal personality, without prejudice to the faculty to purchase the same pursuant to paragraph 4-quater last part*** **[registration in the business registry of the network itself].**

If the contract provides for the establishment of a common equity fund and a common body intended to carry out an activity, including commercial activity, with third parties:

1) (...abrogated)

2) the provisions of articles 2614 and 2615, second paragraph, of the Italian Civil Code apply to the mutual fund as compatible [on funds of consortia]*; in any case,* ***for the obligations contracted by the common body in relation to the network programme, third parties can assert their rights exclusively on the common fund****;*

3) within two months after the end of the financial year, the common body shall draw up a balance sheet, observing, as compatible, the provisions relating to the statutory financial statements of the public limited company, and file it with the business registry of the place where it is located; Article 2615-bis, third paragraph, of the Italian Civil Code applies as compatible.

4. For the purposes of compliance with the provisions of paragraph 4-quater, the contract must be drawn up by public deed or authenticated private deed, or by deed digitally signed in accordance with articles 24 or 25 of the code referred to in the legislative decree of 7 March 2005, n. 82, and subsequent modifications, by each entrepreneur or legal representative of the participants, transmitted to the competent offices of the business registry through the standard model typified by decree of the Minister of Justice, in agreement with the Minister for the Economy and Finance and with the Minister for Economic Development (...)."

Consortia (with external activities, not just for internal organization of members) under Italian law	**Contractual networks under Italian law**
The establishment of a Consortium provides for a common organization for the regulation and performance of certain phases of the respective companies.	*In the Network the common organization is aimed at collaborating in forms and in areas predetermined for the exercise of the companies, or to exchange information or services of an industrial, commercial, technical or technological nature or to jointly exercise one or more activities falling within the scope of their business, on the basis of a common network programme.*
The Consortium is a legal and tax entity independent of the member companies, has its VAT/TVA number and its registration with the business registry.	*In the Network the companies are independent and no new entity is in principle created, unless the network registers as a legal entity with the business registry.*
Precisely because of its individuality, the Consortium also provides for an external activity, with its own business registration or various attestations, and, in the cases of Consortia set up as Consortium companies with limited liability, also its own patrimonial autonomy, equating it to limited liability companies.	*The Network does not have its own autonomy or its own business registration, but is registered in the register of each participant in the Network and acquires effectiveness, only after having noted the same on all the participants at their registration in the business registry, unless the network registers as a legal entity with the business registry.*
The activity of the Consortium is instrumental to the activity of the consortium members, putting in place an essentially mutualistic function.	*The Network Contract allows the exercise in common of activities not only instrumental but strategic for the development of the participating enterprises.*
In the Consortium an object must always be identified, which is its typical activity.	*The Network contract provides a programme, a commitment to achieve certain objectives; within this, it specifies the main objectives pursued, the procedures that will allow the achievement of these objectives and the criteria for their evaluation.*
The Consortium provides, just like companies, an administration organized with a single director or, more frequently, through a board of directors.	*A wide choice of schemes may apply to Networks, depending on whether the model of an "exchange network" [where parties only exchange goods or services] is chosen, with a very simplified structure, or "light Networks", executing more articulated activities with a more organized structure, also through the establishment of a common body, or "heavy Networks" to the point that the Network may have its own legal personality by registering it with the business registry.*

***Società di persone* under Italian law (broadly paralleling partnership under common law)**	**Contractual networks under Italian law**
Two or more persons confer goods or services for the joint operation of an economic activity in order to divide the profits. [A partnership is an unincorporated association of two or more individuals to carry on a business for profit.]	*The common organization turns around a project [see above for definition of contractual networks]*
Unlimited liability.	*In case of establishment of a mutual fund, for the obligations contracted in relation to the network programme:* - *Third parties can assert their rights exclusively on the common fund;* - *Creditors of the members have no right whatsoever over such mutual fund.*
Flexibility in regulation of organization, but within the general scheme of società di persone. *Notwithstanding the flexibility and easiness of establishment,* società di persone *are included in the general category of "companies".*	*Much stronger flexibility since there is no limitation by the reference to a specific general category. Autonomy of contracts applies.*

United Nations A/CN.9/955

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Recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law

Note by the Secretariat

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I. Introduction

1. This note sets forth revisions of the draft guide to enactment of the draft model law on recognition and enforcement of insolvency-related judgments as agreed by Working Group V (Insolvency Law) at its fifty-third session (New York, 7–11 May 2018). The report of that session is contained in document A/CN.9/937. This note should be read in conjunction with the text of the draft guide, which is set forth in document A/CN.9/WG.V/WP.157 and the latest version of the draft model law, which is contained in the annex to document A/CN.9/937.

2. Minor amendments are indicated by reference to the paragraph of the report of the fifty-third session (A/CN.9/937, chapter IV.B) in which they were recorded. Where redrafting of a paragraph was requested at that session, the revised text of that paragraph, as proposed by the Secretariat, is included in this note.

3. It is intended that the guide to enactment, as published, will include the final text of the articles of the model law once both texts have been finalized and adopted by the Commission.

II. Revisions to the draft guide to enactment contained in document A/CN.9/WG.V/WP.157

4. Paragraph 13, first sentence: delete the words "and its interpretation and application" (A/CN.9/937, para. 40).

5. Paragraph 18: replace the words "it is recommended that States" with the words "States may wish to" in the third sentence, delete the last sentence and add explanation of benefits of enacting the model law (A/CN.9/937, para. 41). From the third sentence, the paragraph might read:

> "Therefore, in order to achieve a satisfactory degree of harmonization and certainty, States may wish to make as few changes as possible when incorporating the Model Law into their legal systems. That approach will not only assist in making national law as transparent and predictable as possible for foreign users. It will also contribute to fostering cooperation between insolvency proceedings as the laws of different States will be the same or very similar; to reducing the costs of proceedings because of greater efficiency in the recognition of judgments; and to improving consistency and fairness of treatment of insolvency judgments in the cross-border context."

6. Chapter III.B: insert a section explaining references to "courts" (A/CN.9/937, paras. 19 and 39). The following section might be added after paragraph 27:

> "*Competent court or authority*
>
> "As indicated in article 2, subparagraph (c), the Model Law envisages that a judgment can be issued by a court or an administrative authority in the originating State, provided that a decision issued by an administrative authority has the same effect as a court decision. This usage is consistent with the approach taken to the concept of 'court' in the MLCBI (art. 2, subpara. (e)), and the UNCITRAL Legislative Guide on Insolvency Law (glossary, para. 8).
>
> "Moreover, article 4 contemplates that the body competent to perform the functions of the Model Law with respect to recognition and enforcement in the receiving State may be either a court or administrative authority, as designated by the enacting State. For ease of reference, the Model Law uses the word 'court' to refer to that authority. In the event that the body designated under article 4 is an administrative authority, the State may wish to consider replacing the word 'court', where it refers to the receiving State, with the word 'authority'."

7. Paragraph 30: add a cross-reference to paragraph 57 (A/CN.9/937, para. 44(a)).

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8. Paragraph 37: revise the paragraph (A/CN.9/937, paras. 42 and 44(b)). The paragraph might read as follows:

> "37. As discussed in more detail in the article-by-article remarks below, the Model Law includes an optional provision that permits recognition of an insolvency-related judgment to be refused when the judgment originates from a State whose insolvency proceeding (being an insolvency proceeding that met the definition of that term as used in the Model Law) is or would not be susceptible of recognition under the MLCBI. Under the terms of the MLCBI, the insolvency proceeding may not be recognizable because that State is neither the location of the insolvency debtor's centre of main interests (COMI) nor of an establishment of the debtor (i.e. it is neither a main nor a non-main proceeding).
>
> "37bis. That principle of non-recognition of insolvency proceedings under the MLCBI is acknowledged in article 13, subparagraph (h) of the Model Law, which is an optional provision for consideration by States that have enacted (or are considering enactment of) the MLCBI. The substance of subparagraph (h) also provides an exception to that general principle. The exception permits recognition of a judgment, notwithstanding its origin in a State whose insolvency proceeding is or would not be recognizable under the MLCBI, provided: (i) the judgment relates only to assets that were located in the originating State; and (ii) certain conditions are met. The exception could facilitate the recovery of additional assets for the insolvency estate, as well as the resolution of disputes relating to those assets. Such an exception with respect to the recognition of insolvency proceedings is not available under the MLCBI (discussed further below, paras. ...)."

9. Paragraph 41: delete the paragraph (A/CN.9/937, para. 44(c)).

10. Paragraph 44, last sentence: delete the last part of the sentence, commencing with the words "as that judgment" (A/CN.9/937, para. 44(d)). The last sentence of the paragraph will thus read:

> "Subparagraph 2(d) of the Preamble confirms that the Model Law is not intended to apply to a judgment commencing an insolvency proceeding."

11. Paragraph 46: add examples of other possible exemptions from the scope of the model law (A/CN.9/937, para. 44(e)). The sentence might read as follows:

> "These might include, for example, judgments concerning foreign revenue claims, extradition for insolvency-related matters, family law matters, or judgments relating to entities excluded from the Model Law, such as banks and insurance companies."

12. Paragraph 49: reflect that the "insolvency representative", although defined in the model law, might be referred to by different names in various jurisdictions (A/CN.9/937, para. 44(f)). The paragraph, after the first sentence, might read as follows (along the lines of the Legislative Guide on Insolvency Law, part two, chapter III, para. 35):

> "Insolvency laws refer to the person responsible for administering the insolvency proceedings by a number of different titles, including 'administrators', 'trustees', 'liquidators', 'supervisors', 'receivers', 'curators', 'official' or 'judicial managers' or 'commissioners'. The term 'insolvency representative' is used in the Model Law to refer to the person fulfilling the range of functions that may be performed in a broad sense without distinguishing between those different functions in different types of proceeding. The insolvency representative may be an individual or, in some jurisdictions, a corporation or other separate legal entity."

13. Paragraph 55: replace the words "without more" with the words "without additional court orders" (A/CN.9/937, para. 44(g)).

14. Paragraph 57: remove the reference to first day orders (A/CN.9/937, para. 44(h)). That might be achieved by deleting the words "and other judgments that might in some jurisdictions be described as first day orders" in the third sentence and combining that sentence with the next sentence along the following lines:

> "The Model Law does, however, cover judgments issued at the time of commencement of insolvency proceedings, such as appointment of an insolvency representative, judgments or orders addressing payment of employee claims and continuation of employee entitlements, retention and payment of professionals, acceptance or rejection of executory contracts, and use of cash collateral and post-commencement finance."

15. Subparagraph 59(d): revise the paragraph as follows (A/CN.9/937, para. 44(i)):

> "Judgments determining whether the debtor owes or is owed a sum or any other performance not covered by subparagraph (a) or (b). The enacting State will need to determine whether this category should extend to all such judgments regardless of when the cause of action arose. While it might be considered that a cause of action that arose prior to the commencement of the insolvency proceedings was sufficiently linked to the insolvency proceeding, as it was being pursued in the context of, and could have an impact on, that proceeding, it might also be considered that a judgment on such a cause of action could have been obtained by or against the debtor prior to the commencement of the insolvency proceeding and, thus, lacked a sufficiently material association with the insolvency proceedings."

16. Paragraph 63, last sentence: add the word "could" before the word "apply" (A/CN.9/937, para. 44(j)).

17. Paragraph 73: delete the paragraph in the light of the clear explanation already contained in paragraph 72 (ACN.9/937, para. 44(k)).

18. Paragraph 78: delete the fifth sentence starting with the word "Thus" and the first part of the sixth sentence up to the words "a decision" (A/CN.9/937, para. 44(l)). The fourth and fifth sentences will thus read:

> "Enforcement, on the other hand, means the application of the legal procedures of the receiving court to ensure compliance with the judgment issued by the originating court. A decision to enforce the judgment must, for the purposes of the Model Law, be preceded or accompanied by recognition of the judgment."

19. Paragraph 80, first sentence: replace the words "review by an appellate court" with the words "review by way of an appeal to an appellate court" (A/CN.9/937, para. 44(m)).

20. Paragraph 83: replace the words "entitlement to apply" with the words "the conditions for applying" and the word "defines" with the word "sets" (A/CN.9./937, para. 44(n)). Noting that the last sentence of paragraph 83 as drafted was taken from the Guide to Enactment and Interpretation of the MLCBI (see para. 127), add a cross-reference to article 10, paragraph 2 (A/CN.9/937, para. 46). Paragraph 83 might thus read:

> "Article 10 establishes the conditions for applying for recognition and enforcement of an insolvency-related judgment in the enacting State, as set out in paragraph 2, and the core procedural requirements. Article 10 thus provides a simple, expeditious structure to be used for obtaining recognition and enforcement."

21. Paragraph 110, first sentence: add the word "solely" before the words "on a ground" (A/CN.9/937, para. 44(o)).

22. Paragraph 111: add the following sentences at the end of the paragraph (A/CN.9/937, para. 44(p)):

> "The originating court does not need to have explicitly relied on or made findings regarding the relevant basis for jurisdiction, so long as that basis for jurisdiction existed at the relevant time. The originating court's reliance on additional or different jurisdictional grounds does not prevent one of the 'safe harbours' from applying."

23. Paragraph 113: delete the fourth sentence and the first part of the last sentence up to the words "it does not prevent" (A/CN.9/937, para. 44(q)). To adjust the drafting, the third and fourth sentences might read:

> "The method of raising the objection to jurisdiction is a matter for the law of the originating State. A receiving court, in an appropriate case, may make inquiries where matters giving rise to concern become apparent."

24. Between paragraphs 115 and 116, heading relating to subparagraph (h): delete the phrase "and relating only to assets" (A/CN.9/937, para. 44(r)).

25. Paragraph 118: move the paragraph before paragraph 117 (A/CN.9/937, para. 44(s)).

26. Paragraph 121: delete the last sentence (A/CN.9/937, para. 44(t)).

27. Paragraph 121 and paragraph 122, second sentence: replace references to "relief" with references to "a form of relief" (A/CN.9/937, para. 44(u)).

28. Paragraph 126: add the following sentence at the end of the paragraph (A/CN.9/937, para. 44 (v)):

> "The enactment of this provision is not necessary in jurisdictions where the MLCBI is interpreted as covering the recognition and enforcement of insolvency-related judgments".

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Consideration of issues in the area of insolvency law

Finalization and adoption of a model law on cross-border recognition and enforcement of insolvency-related judgments and its guide to enactment

Compilation of comments on the draft model law on the recognition and enforcement of insolvency-related judgments as contained in an annex to the report of Working Group V (Insolvency Law) on the work of its fifty-second session (A/CN.9/931)

Note by the Secretariat

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I. Introduction

1. At its forty-seventh session, in 2014, the Commission mandated its Working Group V (Insolvency Law) to develop a model law or model legislative provisions providing for the recognition and enforcement of insolvency-related judgments.[1] In pursuance of that mandate, the Working Group worked to develop a draft model law from its forty-sixth (Vienna, 15–19 December 2014) to its fifty-third session (New York, 7–11 May 2018). At its fifty-second session (Vienna, 18–22 December 2017), the Working Group requested the Secretariat to transmit the revised text of the draft model law (as set forth in the annex to the report of that session (A/CN.9/931)) to Member States for comment, before referring the draft model law to the Commission for consideration at its fifty-first session, in 2018.

2. In February 2018, Governments and invited international organizations were invited to submit comments on the draft model law on the recognition and enforcement of insolvency-related judgments, as approved by the Working Group at its fifty-second session.

3. The present document reproduces, in chronological order, comments on the draft model law as received by the Secretariat, with formatting changes.

II. Compilation of comments

A. Governments

1. Thailand

[Original: English]
[11 April 2018]

1. Article 2(c) "Judgment"

The definition should add the following sentence at the end of the current meaning: A criminal case judgment stemming from an insolvency case is not a judgment under this Law. This exclusion should be written explicitly as a model law provision, not simply in the Guide to Enactment. This statement will reassure the United Nations members especially the parliament of each country, when deliberating about this, that the Law will not interfere/go into the area of criminal case.

2. Article 15 Severability

Second line: should change from "shall be granted" to "may be granted". For this article, the Law needs to provide flexibility to the local court in recognizing the judgment.

2. Mexico

[Original: Spanish]
[16 April 2018]

Article 9 bis, paragraph 1

- The note by the Secretariat on the draft model law (A/CN.9/WG.V/WP.150) should be taken into account, particularly paragraph 14 on refusal of recognition or enforcement of the judgment, and paragraph 15 on the provision of security. In addition, a definition should be provided of "ordinary review", because the nature of such review varies from State to State.

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

Article 12, subparagraph (d)

- It is proposed to return to the previous wording, namely: "(d) Recognition and enforcement is sought from or arises by way of defence or as an incidental question before a court referred to in article 4", because enforcement may also arise as an incidental question.

3. Bolivarian Republic of Venezuela

[Original: Spanish]
[16 April 2018]

1. Background

The Secretariat of the United Nations, through note LA/TL 133 (15) CU2018/44/OLA/ITLD of 7 February 2018, invited the Permanent Mission of the Bolivarian Republic of Venezuela to the United Nations to submit comments on the draft model law on the recognition and enforcement of insolvency-related judgments, as approved by Working Group V (Insolvency Law) of the United Nations Commission on International Trade Law (UNCITRAL).

2. Legal commentary

The scope of application of the draft model law comprises the cross-border recognition and enforcement of insolvency-related judgments, as reflected in its title and article 1.

In that regard, it is first necessary to consider what is meant by cross-border insolvency. To do so, we must examine the definition provided by UNCITRAL, which establishes that cross-border insolvency is essentially an economic phenomenon that occurs where a debtor becomes insolvent and has assets in more than one State, or where some of the creditors of the debtor are not from the State in which the insolvency proceedings have been instituted.

In the light of the foregoing, it appears that the definition of cross-border insolvency encompasses two situations involving foreign legal systems, namely:

1. Where the insolvent debtor has assets in more than one State;
2. Where some of the creditors of the insolvent debtor are not nationals of the State in which the debtor is declared insolvent.

It is therefore necessary to examine cross-border insolvency in the light of the provisions of the Act on Private International Law of the Bolivarian Republic of Venezuela, which establishes that the creation, content and extension of rights over assets are governed by the law of the place where the asset or assets are located, a principle that is also reflected in the Commercial Code. In addition, the Act does not establish any specific rules in relation to insolvency, which is why it is necessary to refer to the provisions of the Commercial Code, which governs the insolvency regime through the legal concepts of arrears and bankruptcy.

In that regard, it should be noted that arrears is a commercial law concept that covers situations in which a trader, finding itself temporarily unable to repay outstanding debts, requests the competent commercial court to declare it in arrears in order to enable the voluntary liquidation of its business, within a reasonable time frame not exceeding 12 months, and undertakes not to carry out any business other than simple retail business while its request is being considered. The declaration of arrears requires that the assets of the company should exceed its liabilities.

Furthermore, the Commercial Code of the Bolivarian Republic of Venezuela provides that any trader that is not in arrears but is unable to repay its outstanding debts may initiate bankruptcy proceedings.

Thus, bankruptcy is an economic term that refers to a trader whose assets are insufficient to meet its debts. Accordingly, laws in the collective interest have hitherto

regulated such situations and established substantive rules whose purpose is to determine the scope of the concept of bankruptcy in domestic legislation, as well as procedural rules that regulate the proceedings.

It follows from the foregoing that domestic legislation governs insolvency, and in that regard it is important to make a number of comments regarding jurisdiction to determine bankruptcy in the case of the Bolivarian Republic of Venezuela, given that the outcome of bankruptcy proceedings has consequences erga omnes, which is a derogation from the principle according to which a judgment is considered to have the force of res judicata only with respect to the parties: the principle of "relativity of res judicata".

Thus, in the Bolivarian Republic of Venezuela, as a general rule, the court that has jurisdiction over a bankruptcy proceeding is the court of the place of business of the bankrupt party, in other words, its principal place of business and interests. It is important to note that, accordingly, legal opinion has tended to favour the principle of "unity of bankruptcy", which means that bankruptcy proceedings may be initiated only in the place of business of the trader. Therefore, in cases involving multiple places of business, the main place of business shall be the registered office, or the place where the headquarters is located.

However, in cases in which a trader is declared bankrupt by a foreign court and has a branch in the Bolivarian Republic of Venezuela, the court's decision must be subject to an exequatur procedure in order to take effect.

To a certain extent, the previous statement conflicts with legal opinion and international legislation insofar as they defend the absolute unity of bankruptcy, which entails the extraterritorial application of bankruptcy judgments without an exequatur.

However, the position of the Venezuelan legislator is based on the principle of effective judicial protection, enshrined in article 26 of the Constitution of the Bolivarian Republic of Venezuela, which provides for judicial guarantees, also known as the right to effective judicial protection, which has been defined as the right of every person to seek the assistance of the organs responsible for the administration of justice so that their claims can be considered through proceedings that ensure basic guarantees. Judicial guarantees therefore constitute the right to access justice through proceedings conducted by an organ in order to obtain a decision issued in accordance with the law.

Effective judicial protection is a constitutional procedural guarantee that must be in place from the moment a person accesses the judicial system until the judgment issued in the case concerned is definitively enforced. In other words, once access to justice is guaranteed, every other constitutional guarantee and principle that shapes the proceedings, such as due process, expeditiousness, defence and cost-free legal assistance must be protected on the basis that the undermining of any of those guarantees would violate the principle of effective judicial protection.

Therefore, the right to effective judicial protection is intended to ensure an effective mechanism that enables individuals to redress a situation in which their rights have been violated, and comprises the right to access; the right to cost-free legal assistance; the right to an appropriate, coherent and duly grounded judgment that is issued without undue delay; interim protection; and guaranteed enforcement of the sentence.

Furthermore, article 53 of the Act on Private International Law establishes that foreign judgments shall have effect in the Bolivarian Republic of Venezuela provided that, inter alia, they do not concern rights in rem over immovable property located in the Bolivarian Republic of Venezuela, and that the Bolivarian Republic of Venezuela has not been deprived of any exclusive jurisdiction it may have over the matter; and that the courts of the sentencing State have jurisdiction to hear the case, in accordance with the general principles governing jurisdiction that are recognized in national legislation.

3. Final consideration

In the light of the above, the Office of the Legal Adviser is of the view that, taking into account the different legal systems, the scope of application of the model law will not achieve the effectiveness sought, as the recognition and enforcement of foreign judgments necessarily involves domestic proceedings, for which an exequatur is required in most States.

Thus, it is believed that a domestic law would be unable to regulate foreign judicial cooperation mechanisms effectively given that its scope of application would not enable it to be enforcemable or effective against another State.

4. Colombia

[Original: Spanish]
[24 April 2018]

1. CONTENT OF THE DRAFT LAW

The draft model law on the recognition and enforcement of insolvency-related foreign judgments is the result of work carried out by Working Group V (Insolvency Law) of the United Nations Commission on International Trade Law with the aim of achieving the application, in each of the States parties, of judgments issued as a result of a judicial or administrative decision in the context of an insolvency proceeding.

The draft model law contains a preamble and 15 articles.

It should first be noted that in accordance with article 3 of the draft model law, the law "shall not apply to a judgment where there is a treaty in force concerning the recognition or enforcement of civil and commercial judgments (whether concluded before or after this Law comes into force), and that treaty applies to the judgment".

In that regard, and having examined the constitutionality rulings of the court in respect of international treaties and conventions signed by Colombia, we have not found any multilateral documents on that subject.

2. COMMENTS REGARDING THE TEXT OF THE DRAFT MODEL LAW

Paragraph 1 (f) of the preamble to the draft model law states that the purpose of the law is, "where legislation based on the Model Law on Cross-Border Insolvency has been enacted, to complement that legislation", and paragraph 2 of the preamble notes that the purpose of the law is not "(a) To [replace or] displace other provisions of the law of this State with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment" or "(b) To replace [or displace] legislation enacting the Model Law on Cross-Border Insolvency or limit the application of that legislation". In that regard, it should be noted that in 2006, Colombia adopted Act No. 1116 establishing an enterprise insolvency regime, which addresses cross-border insolvency in part III.

[...]

Thus, it is considered that the provisions of Colombian legislation that govern matters related to insolvency and the enforcement of related judgments go beyond the purposes set out in paragraph 1 of the preamble to the draft model law on the recognition and enforcement of insolvency-related judgments, which does not cover any aspects that might complement those provisions.

In respect of article 4 of the draft model law, it is recommended that the competent authorities referred to in article 89 of Act No. 1116 of 2006 should be taken into account.

3. ANALYSIS OF CONSTITUTIONALITY

The content of the preamble and the articles of the draft model law affects neither constitutional values and principles nor fundamental rights.

4. CONCLUSIONS

We note that part III of Act No. 1116 of 2006 amply and extensively captures the content of the draft model law, that text having been fully incorporated into the Colombian legal system.

5. Uruguay

[Original: Spanish]
[4 May 2018]

1. This Directorate recently received the document in which the Government of Uruguay was requested to provide comments in relation to the draft model law on the recognition and enforcement of insolvency-related judgments, which has been drafted within the framework of the United Nations Commission on International Trade Law (UNCITRAL).

2. Of the possible methods for standardizing international legislation in a given area, UNCITRAL has opted for a draft model law, which will be made available to States so that they can incorporate it into their domestic law in full or in part, in accordance with their national legislation. Other options included the creation of a treaty, agreement or convention, which would presuppose the existence of common, basic rules for the distribution of legislative and jurisdictional powers at the international level.

3. With regard to comments and concrete suggestions, we wish to provide the following information:

(a) In subparagraph 1 (d) of the preamble, it is stated that the purpose of the law is "To promote comity and cooperation between jurisdictions regarding insolvency-related judgments". With regard to that paragraph, it is suggested to delete the reference to "comity", since in modern international law it is understood that foreign law is applied or foreign judgments are recognized, where appropriate, on the basis of a legal obligation rather than a discretionary act based on "comity" towards other States in the international community. Therefore, the law should simply state "To promote cooperation between jurisdictions regarding insolvency-related judgments".

(b) Furthermore, subparagraph 2 (a) of the preamble states that the purpose of the law is not "To [replace or] displace other provisions of the law of this State with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment". Given that international insolvency or bankruptcy provisions can be found in both national and international legislation on private international law, it is suggested to adjust that wording as follows: "To [replace or] displace other provisions of the law of this State**, whether those provisions have national or international law as their source,** with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment".

(c) Article 3, paragraph 1, of the draft law states, under the heading "International obligations of this State", that: "To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail." Given that if this draft law were adopted by a number of States at the domestic level, it would constitute private international law with national law as its source, it is clear that there is no possibility of "conflict" with treaties or other agreements (which form a part of private international law with international law as its source) because the scope of application of each is distinct (see, inter alia, art. 27 of the Vienna Convention on the Law of Treaties, and art. 1 of the Inter-American Convention on General Rules of Private International Law). The following alternative wording is therefore suggested with respect to paragraph 1 of article 3: "The provisions of this Law shall apply in the absence of a treaty or other form of agreement

to which this State is a party with a State or States whose legal systems are involved in a particular case."

(d) Article 7 refers, as is traditional, to public policy exception, stating that "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State". In keeping with the position traditionally taken by Uruguay on the subject, as reflected in its national legislation on private international law, and in line with the declaration that Uruguay made at the time of signing the Inter-American Convention on General Rules of Private International Law (Montevideo, 1979), it is suggested to add the word "international" to the references to that exception, both in the *nomen juris* and in subsequent references, so as to reduce to a minimum the number of cases in which the exception applies, that is, limiting its application to situations in which basic rules and principles that shape the individual legal system of a particular country are violated in a concrete, serious and flagrant manner. Similarly, it is suggested to replace the reference to "procedural fairness" with the broader, more comprehensive and universal concept of "due process". Accordingly, the following wording is suggested: "International public policy exception. Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the international public policy, including the fundamental principles of due process, of this State". Alternatively, if it is not possible to include the word "international", reference should be made to "the basic principles of its public policy".

(e) Article 9, paragraph 1, states that "An insolvency-related foreign judgment [...] shall be enforced only if it is enforceable in the originating State". It would be appropriate to change "shall" to "may", since the judgment does not necessarily have to be enforced; its recognition may suffice.

(f) Article 10, paragraph 1, establishes the legal standing to apply for recognition and enforcement of an insolvency-related judgment, stating that "An insolvency representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment..." shall have that legal standing. Our understanding is that such standing should be accorded both under the law of the originating State and under the law of the State where recognition and enforcement are sought, as there may be local creditors interested in initiating that process, with the effects and scope established by the law of the forum. It is therefore suggested to add text to that effect.

(g) Article 13 establishes res judicata as one of the grounds to refuse recognition and enforcement of a foreign insolvency-related judgment, both in relation to a judgment issued in the enacting State and in relation to a judgment issued in another State (paras. (c) and (d), respectively). However, the wording of those provisions differs in that paragraph (c) does not state whether the judgment issued in the State where recognition and enforcement is sought should be an earlier judgment, or whether it should relate to the same subject matter. In order to bring that wording into line with paragraph (d), it is suggested that paragraph (c) should be modified to read: "The judgment is inconsistent with an earlier judgment issued in this State in a dispute between the same parties on the same subject matter".

(h) Lastly, article 13 (g) establishes the cases in which recognition and enforcement may be refused on the basis of matters of indirect international jurisdiction, in other words, positive criteria on the basis of which a court is considered to have jurisdiction, from an international perspective, to issue a judgment with extraterritorial effects. The current draft of the model law considers valid the criterion of party autonomy, including the extension of jurisdiction (subparas. (i) and (ii)); the criterion of lex fori (i.e. jurisdiction was exercised on the same basis on which a court in the enacting State could have exercised jurisdiction (subpara. (iii))); and lastly, a criterion that is yet to be defined, as indicated by alternatives set out in square brackets: "(iv) The court exercised jurisdiction on a basis that was not [inconsistent] [incompatible] with the law of this State". In our view,

subparagraph (iv) should be replaced with a more comprehensive provision that states: "The court exercised jurisdiction in accordance with its own law", i.e. establishing a *lex causae* criterion. From a practical point of view, that wording would more clearly provide for the possibility for judgments issued by Uruguayan judges to be recognized and enforced abroad, as, in the case of Uruguay, it would be a Uruguayan law that would establish the bases for the jurisdiction of Uruguayan judges, without such provisions being subject to any arrangements that might have been agreed between the parties (which is not allowed under Uruguayan legislation) or the procedural law of the State receiving the judgment.

4. It should be noted that Uruguay has modern legislation in relation to the international insolvency regime, both with regard to aspects linked to and the law applicable to jurisdiction and in respect of the effectiveness in Uruguay of foreign judicial decisions in that area. Those provisions are contained in articles 239 to 247 of part XIII of Act No. 18.387 of 23 October 2008, which are reproduced below for ease of reference. Legislation on private international law is complemented by the provisions of the international commercial law treaties of 1889 (concluded with Bolivia, Colombia and Peru and in force) and 1940 (concluded with Argentina and Paraguay and in force).

[...]

5. Lastly, it should be noted that currently, in the context of the Hague Conference on Private International Law, a special commission has been working to prepare a draft convention on the recognition and enforcement of foreign judgments, the most recent version of which excludes from its scope of application "insolvency, composition, resolution of financial institutions, and analogous matters" (art. 2 (1) (e) of the draft convention as at November 2017).

The information provided is submitted for consideration.

6. Mexico

[Original: Spanish]
[7 May 2018]

Title of the draft law

1. The reference to "insolvency-related judgments" is erroneous because the judgments in question are judgments on insolvency cases. The same expression is used in articles 2 (d); 4; 5; 9; 10; 11 (1) (a) and (b); 11 (3); 12 (b); and 13.

Comment: In that regard, it is recommended to specify that it is a **draft law on judgments on insolvency cases**.

2. The square brackets in paragraph 2 of article 1 would usually contain information as to the situations in which the model law would not apply, such as matters that are regulated in other documents or that fall within the exclusive jurisdiction of States.

3. In article 2, on definitions, there is a problem with the definition of judgments contained in paragraph (c).

3.1. The draft law states: "'Judgment' means any decision, whatever it may be called".

3.1.2 In that paragraph, the definition refers to "any decision" and in the second sentence of the paragraph, a "decision" is defined as follows: "For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses by the court".

3.1.3. Here it should be noted that according to the definition of "decision", a judgment does not refer to any proceeding and is limited to decrees or orders issued by a court.

3.1.4. In addition to the above limitation, the final sentence of paragraph (c) states: "An interim measure of protection is not to be considered a judgment for the purposes of this Law".

3.1.5. It is indeed correct to state that an interim measure of protection is not a judgment; however, the definition of "judgment" is undermined by its additional description as "any decision".

3.1.6. In conclusion, the provision is made unclear by the introduction of concepts that give rise to contradictions.

3.1.7. Subparagraph (d) (ii) of article 2 states: "Does not include a judgment commencing an insolvency proceeding". In the Spanish version of the text, the meaning of that paragraph is unclear unless the word "como" is added after the words "no se entenderá".

Comment: In summary, it is necessary to clarify article 2 in the light of the above-mentioned points.

4. Articles 4, 5 and 6 refer to the concept of "enacting State", a term that is incorrect. In view of the context, the words "enforcing State" should be used.

5. The final sentence of paragraph 1 of article 10 states that "The issue of recognition may also be raised as a defence or as an incidental question in the course of proceedings".

5.1. That sentence addresses two situations:

- One in which recognition is considered as a defence, and
- One in which recognition is raised as an incidental question.

5.1.1. To state that recognition is a procedural defence is completely incorrect; the legal nature of recognition involves the finding by a foreign judge that a judgment or decision is valid and their endorsement of a decision or judgment issued by another judge.

5.1.2. It is correct that recognition is an incidental question; a judgment is recognized incidentally.

6. Article 11 (b) begins with the words "(b) Granting other legal or equitable relief, as appropriate".

6.1. In the Spanish version of the text, it is recommended to modify the words "hacer lugar", which is the translation given for "granting", because the context of the article indicates that the correct wording should be "habrá lugar".

7. Article 12 (d) emphasizes that the question of recognition arises by way of defence; that is an error for the reasons given above with respect to article 10 (1).

8. Article 15 echoes the earlier reference to the granting of recognition, with the words "Se hará lugar al reconocimiento" in the Spanish text. Although the meaning is understood, the correct wording would be: "habrá lugar al reconocimiento".

Conclusions: The draft law is unclear in its definitions, certain concepts are used incorrectly, and recognition can in no way be a means of defence.

7. Mali

[Original: French]
[8 May 2018]

Comments:

Firstly, it is important to remember that unlike a uniform law, which is incorporated without modification into the domestic legal system of the States concerned, the model law provides only a framework that States can use when drawing up their draft

text. It follows that the draft model law is not a ready-to-adopt draft law. It should be analysed from that perspective.

Turning to the substance of the draft law, that is, the problem that it addresses, we have a number of reservations:

- Usually, issues regarding the enforcement of foreign judgments (which is essentially the matter at hand) are addressed either through the exequatur provisions of domestic procedural texts or through agreements on judicial cooperation or mutual legal assistance, which are fundamentally bilateral in nature. That is all the more understandable given that States do not have the same legal systems or the same judicial organizations. In Mali, exequatur is dealt with by articles 515 et seq. of the Code of Civil, Commercial and Social Procedure. The draft model law addresses insolvency, but Malian legislation is more comprehensive because it covers all foreign acts and judgments. It should be noted that, in addition to the procedure and conditions set out in articles 516 and 517 of the Code of Civil, Commercial and Social Procedure, article 518 of the Code states that judgments issued in a foreign country may be granted an exequatur only if, on the basis of reciprocity, decisions issued in Mali may be granted an exequatur in that foreign country.
- We also note that the draft model law is focused on collective proceedings. Mali is a member of a community that has passed legislation in that area: the Organization for the Harmonization of Business Law in Africa (OHADA). Those collective proceedings (discharge of liabilities, court-supervised reorganization proceedings and liquidation of assets) are comprehensively addressed in a uniform act.
- While the draft model law covers the recognition of judgments, it appears that there are substantive implications, for example, with regard to provisional relief. We believe that it would have been judicious to first elicit a response from that community, in view of the subject specifically addressed, rather than presenting the draft model law to States individually.

8. Albania

[Original: English]
[10 May 2018]

Comment (National Bankruptcy Agency):

UNCITRAL experts have to take into consideration that the creditor who has been partially satisfied in respect of its claim in a proceeding pursuant to a law relating to bankruptcy in a foreign State may not be satisfied for the same claim in a bankruptcy proceeding in another State, regarding the same debtor, so long as the satisfied amount to the other creditors of the same rank is proportionately less than the amount that the creditor has already received, without affecting in this situation, secured creditor's claims.

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Compilation of comments on the draft model law on the recognition and enforcement of insolvency-related judgments as contained in an annex to the report of Working Group V (Insolvency Law) on the work of its fifty-second session (A/CN.9/931)

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II. Compilation of comments [*continued A/CN.9/956*]

A. Governments [*continued*]

9. Turkey

[Original: English]
[23 May 2018]

The Article 2.c. of the Draft Model law stipulates that *"Judgment means any decision whatever it may be called, issued by a court or administrative authority,* ***provided an administrative decision has the same effect as a court decision****. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses by the court. An interim measure of protection is not to be considered a judgment for the purposes of this Law."*

The Permanent Mission, in this context, declares hereby that the judgment in Turkish legislation, is limited by the decisions issued only by a court authority. Decisions of the administrative authorities in Member States, by no means, are recognized as a "judgment" according to Turkish national law.

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II. Compilation of comments [*continued A/CN.9/956*]

A. Governments [*continued*]

10. Sri Lanka

[Original: English]
[11 June 2018]

General Comments

- The term insolvency is not used in Sri Lankan law to define the final outcome of a proceeding (e.g. section 273 (2); section 278 of the Companies Act). In Sri Lanka, companies are wound up for several reasons, e.g. a company being unable to pay its debts. It is assumed the word "insolvency" is used to refer to a situation where a company is unable to pay its debts. However, there are several other grounds on which a company can be wound up in Sri Lanka. These include situations where the company is not insolvent. Therefore, Sri Lanka suggests that a definition of insolvency be included in order that a Sri Lankan court can assess whether a judgment in respect of which recognition and enforcement is sought, is consistent with the laws of Sri Lanka.
- It is also noted that the term "reorganization" used in the treaty is not a concept that is legally recognized in Sri Lanka. Therefore, it is recommended that "reorganization" be defined for the same reasons as mentioned above in requesting a definition for "insolvency".
- Judgments sought to be enforced or recognized under the treaty should necessarily be final judgments. If the purpose of the treaty is to avoid duplication of proceedings, finality on issues ought to be reached in one country prior to seeking enforcement/recognition in another. Therefore, Sri Lanka should recommend that the Working Group consider the implications of seeking recognition or enforcement of judgments which are not final, and suitable amendments.
- It is also noted that the rights of creditors in the country where recognition and enforcement is sought should be preserved and enforcement and recognition of insolvency related judgments should not be permitted if the creditor's rights in that country would be violated in the process. Sri Lanka requests that the Working Group consider this aspect of rights of creditors and make suitable provision to protect the creditors right and not conflict with the same.

Comments on Articles of the Model law

Paragraph 2 of the Preamble

It is recommended that the following provisions be added.

(e) To restrict, suspend or interfere with or prejudice in any way insolvency proceedings in the State in which recognition is sought.

(f) To prejudice the rights of creditors in the country in which the judgment is sought to be enforced.

Article 1 – Scope of Application

It is recommended that the following provisions be added.

"(2) This law does not apply to insolvency related judgments where parallel proceedings have commenced in the country which the judgment is sought to be enforced."

Article 2 – Definitions

(a) The reference to administrative proceedings is not appropriate given that they do not culminate in a judgment. This reference should be removed or qualified.

Please see General Comments above on interim proceedings and reorganization. Accordingly, necessary changes ought to be made to this definition.

(b) The reference to "administer the reorganization" should be removed as it is not part of judicial proceedings.

(c) The reference to administrative authority is inappropriate and should be removed. It is unclear how to define whether or not 'administrative decision has the same effect as a court a decision". Clarification should be sought on how an administrative decision has the same effect as a judicial decision.

As already noted above under General comments, it is essential that the definition of a judgment is limited to a final judgment, maybe subject to review by appellate courts, but not wide enough to encompass an interim order/award, etc.

(d)(i)(a) The term "whether or not that insolvency proceeding has closed" denotes that the judgment may be an interim order and not a "judgment" which is a term used under Sri Lankan law to refer to the final outcome of a case, from which an appeal or review mechanism to appellate courts may or may not be available. As already highlighted reference to interim orders should be removed.

Proposed new addition between Article 3 and 4

New Article

"To the extent that this law conflicts with the Constitution of a State, the Constitution of the Country in which the enforcement is sought will prevail."

Article 5

The purpose of this Article is unclear; e.g. what is the function of the person/body authorized to act in another state; whose interests does that person or body represent.

Article 7

The Court should also be entitled to refuse to take action where the action could be contrary to the fundamental principles of the laws of the State in which the recognition and enforcement is sought.

Article 8

A proviso should be included to Article 8 as follows; "provided that such interpretation is consistent with the laws in the State in which the judgment recognition and enforcement is sought."

Article 9

A time bar should be included for the purposes of this model law. Time should commence to run from the point at which the judgment (with regard to which enforcement and recognition is sought) is delivered in the originating State.

Article 10

The procedural laws in the country in which recognition and enforcement is sought should apply.

Article 11

Procedural laws relating to the grant of provisional relief will be the laws of the country in which recognition and enforcement is sought.

Article 13

It is recommended that the following provisions be included as additional grounds for refusing enforcement.

Where the effect of recognition would be:

To restrict, suspend or interfere with or prejudice in any way insolvency proceedings in the State in which recognition is sought.

To prejudice the rights of creditors in the country in which the judgment is sought to be enforced.

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II. Compilation of comments [*continued from A/CN.9/956 and Add.1 and 2*]

A. Governments [*continued*]

11. Canada

[Original: English/French]
[27 June 2018]

In addition to comments that will be provided during the discussion on the draft Model Law on Cross-border Recognition and Enforcement of Insolvency-related Judgments during the Commission Session, the Government of Canada makes the following proposals.

Article 13 — Grounds to refuse recognition and enforcement of an insolvency-related judgment

Subparagraph (h)

This provision should be eliminated. Under 13 (h), a valid ground for exercise of insolvency jurisdiction over an insolvent debtor could be the mere presence of the debtor's assets in the jurisdiction, without any other connections with the jurisdiction. As such, it does not permit a receiving jurisdiction to refuse recognition of an insolvency-related judgment where an insolvency court exercised jurisdiction over a subject matter and a person in situations where the nexus is tenuous.

New subparagraph

An additional ground to refuse the recognition and enforcement of an insolvency-related judgment should be added in article 13.

Under the existing Model Law on Cross-border Insolvency (e.g., Articles 21 and 22), and the draft Model Law, courts can rely on the concept of "adequate protection" to protect the interests of creditors and interested parties. A challenge under the proposed text is that recognition of judgments does not necessarily involve local or foreign courts who could issue adequate protective measures. As a result, foreign creditors could find themselves in a situation where they are better off than they would have been had they been subject to local insolvency proceedings in the receiving State.

The unavailability of court-ordered adequate protection in relation to incoming foreign judgments facilitates and increases the possibility of forum shopping to the detriment of local creditors. This would be the case when foreign insolvency law rules are different from local rules. For example, in Canada, when a security interest lapses, it can be renewed under certain conditions without being considered a preferential treatment. Similarly, payments by the insolvent debtor under leasehold agreements are considered to be done in the ordinary course of business, while this may not necessarily be the case in foreign jurisdictions. The recognition of foreign judgments could in effect limit the ability of local creditors to protect their rights under insolvency and security interest laws applicable to local elements of the debtor's assets. It also raises the prospect of anti-avoidance proceedings.

This exclusion would essentially target foreign judgments the effect of which is to place a creditor, or a group of creditors, in a better situation than they would be if the judgment had been issued by the receiving court. This new subparagraph could read:

[*Recognition and Enforcement may be refused if*]

(x) The judgment affects the rights of creditors in this State, who could have opened an insolvency proceeding in relation to the same debtor whose insolvency proceeding issued the insolvency-related judgment, and these creditors would be better off if the laws of this State apply, unless they have agreed to this treatment.

V.18-04537

Commentaires du gouvernement du Canada sur le projet de loi type sur la reconnaissance et l'exécution internationales des jugements liés à l'insolvabilité

En plus des commentaires qui seront fournis au cours de la discussion sur le projet de loi type sur la reconnaissance et l'exécution internationales des jugements liés à l'insolvabilité au cours de la session de la Commission, le gouvernement du Canada fait les propositions suivantes.

Article 13. Motifs de refus de reconnaissance et d'exécution d'un jugement étranger lié à l'insolvabilité

Alinéa h)

Cette disposition devrait être éliminée. En vertu de 13 h), un motif valable pour l'exercice de la compétence en insolvabilité à l'égard d'un débiteur insolvable serait la simple présence des biens du débiteur dans la juridiction, sans aucun autre lien avec la juridiction. Ainsi, elle ne permet pas à une cour réceptrice de refuser la reconnaissance d'un jugement lié à l'insolvabilité lorsqu'un tribunal d'insolvabilité a exercé sa compétence sur une matière et une personne dans des situations où le lien est ténu.

Nouvel alinéa

Un motif supplémentaire de refuser la reconnaissance et l'exécution d'un jugement lié à l'insolvabilité devrait être ajouté à l'article 13.

En vertu de la Loi type sur l'insolvabilité internationale existante (les articles 21 et 22, par exemple) et du projet de loi type, les tribunaux peuvent s'appuyer sur le concept de "protection suffisante" pour protéger les intérêts des créanciers et des parties intéressées. Un défi dans le texte proposé est que la reconnaissance des jugements n'implique pas nécessairement des tribunaux locaux ou étrangers qui pourraient prendre des mesures de protection suffisante. En conséquence, les créanciers étrangers pourraient se trouver dans une situation où ils sont avantagés par rapport au traitement qu'ils auraient reçu s'ils avaient été soumis à une procédure dans l'état de reconnaissance.

L'indisponibilité de mesures de protection suffisante ordonnées par un tribunal en relation avec les jugements étrangers visés par la reconnaissance facilite et même augmente la possibilité de faire la recherche d'un tribunal le plus favorable au détriment des créanciers locaux. Ce serait le cas lorsque les règles du droit de l'insolvabilité étranger sont différentes des règles locales. Par exemple, au Canada, lorsqu'une sûreté arrive à son terme, elle peut être renouvelée sous certaines conditions sans qu'un tel traitement ne soit considéré préférentiel. De même, les paiements effectués par le débiteur insolvable en vertu de contrats de location sont réputés avoir été effectués dans le cours normal des activités, bien que cela ne soit pas nécessairement le cas en vertu des règles étrangères. La reconnaissance des jugements étrangers pourrait en pratique limiter la capacité des créanciers locaux à protéger leurs droits en vertu des lois sur l'insolvabilité et sur les sûretés applicables aux éléments locaux des actifs du débiteur. Cela soulève en outre la perspective des procédures d'annulation.

Cette exclusion viserait essentiellement les jugements étrangers ayant pour effet de placer un créancier ou un groupe de créanciers dans une situation plus favorable que si le jugement avait été rendu par le tribunal de reconnaissance. Ce nouvel alinéa pourrait se lire comme suit:

[*La reconnaissance et l'exécution peuvent être refusées si*]

x) le jugement affecte les droits des créanciers dans cet État qui auraient pu ouvrir une procédure d'insolvabilité concernant le même débiteur dont la procédure d'insolvabilité a émis le jugement lié à l'insolvabilité, et ces créanciers bénéficieraient de droits plus favorables si les lois de cet État s'appliquent, sauf s'ils ont accepté ce traitement.